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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1501 137

BROTHERHOOD OF RAILWAY TRAINMEN, ET AL.

versus

TEXAS & PACIFIC RAILWAY COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT, ON BEHALF OF TEXAS-PACIFIC EMPLOYEES And ACCOMPANYING BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No.

BROTHERHOOD OF RAILWAY TRAINMEN, ET AL.

versus

TEXAS & PACIFIC RAILWAY COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of L. B. Adams, S. W. Allen, J. E. Bowie, Lee Carcara, E. A. Cazes, A. N. Dawson, W. L. Day, E. Doiron, J. B. Dotherow, Ted Francis, L. B. Grant, J. M. Hathorn, Jr., W. L. Higginbotham, F. M. Holsomback, D. T. Johnson, A. S. Laborde, Leo Lefebvre, H. W. Lucas, F. D. McKay, J. O. Melder, A. J. Melder, E. J. Mixon, G. M. Mize, N. Schlatre, L. S. Schlatre, L. R. Talbott, F. M. Trammell, C. E. Ward and M. H. Williams for review by this Court on writ of certiorari of a judgment

and decree of the Circuit Court of Appeals for the Fifth Circuit rendered on February 5, 1947, with respect, represents:

1.

STATEMENT OF THE MATTER INVOLVED.

This controversy originated in the United States District Court for the Western District of Louisiana upon a joint petition of the Texas & Pacific Railway Company, hereafter called Texas Company, and the Missouri-Pacific Railroad Company, hereafter called Missouri Company, seeking relief by declaratory judgment (Section 274D Judicial Code) as against the Brotherhood of Railroad Trainmen, hereafter called Brotherhood, and twenty-three individual employees of the said Texas Company, present applicants, hereafter called Texas employees, representing a minority group of the said Brotherhood. R. 2, et seq. The Brotherhood was joined both as a national association domiciled at Cleveland, Ohio, and through its local Rapides Lodge No. 856. The basis for the court's jurisdiction was alleged in paragraph II of the complaint, as follows:

> "This Court has jurisdiction of this action because the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, it is between citizens of different States, and it arises under the laws of the United States, namely, the Railway Labor Act of 1934, as amended (45 U. S. C. A., Section 151 to 164)". R. 4.

The said railways had consolidated their terminal operations in Alexandria, Louisiana where they had previously carried on independent and separate enterprises,

and in connection with said consolidation on June 2, 1927, had entered into a contract with the said Brotherhood, and with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, allocating and assigning crews out of the two groups of employees upon an equitable basis determined after nine months of a supervised testing of relative tonnage handled by said railways, so as to give to all Texas employees of the three brotherhoods approximately 45 per cent of the work required at any one time and to all of the Missouri employees of the three brotherhoods approximately 55 per cent. R. 12, et seq.; R. 63, et seq. This arrangement was shown to be permanent both by the steps which had preceded it as well as under the express terms of the said agreement. It had served as the basis for allocation and assignment unbroken down to the time of the present controversy. Admittedly, after the said consolidation all of said employees whether of the one group or the other were working upon one job under one supervising authority and with one paymaster. R. 149. Most of said employees, including practically all of present applicants, working in said consolidated terminal at the time of the present controversy had been hired subsequent to the said agreement of June 2, 1927. R. 154.

The present action was provoked by the Brotherhood of Railroad Trainmen alone. This brotherhood is the bargaining agency under the Railway Labor Act for the said Texas employees as well as for the Missouri employees. The purpose of the provoking action was to change the allocations as between the two groups of employees so as to allow 65 per cent to the Missouri employees and only 35 per cent to the Texas employees. R. 16.

This new agreement revising and reinterpreting the contract of June 2, 1927, was prepared by the said Brotherhood and presented to the railways for execution. R. 18. The other two brotherhoods did not participate. Thus, no change was or is proposed in the allocation of employees in the said terminal as to locomotive engineers or locomotive firemen and enginemen. As to these two groups, the allocation as between Texas employees and Missouri-Pacific employees is to remain as prescribed by the said agreement of June 2nd. Manifestly, the new agreement proposes a change that will result in a marked prejudice to the said Texas-Pacific employees, applicants here. The effect will be to deprive some of these men who now have regular jobs of all work and to force others on an irregular extra board. Decrease and in some instances complete loss of income will result and in all cases serious prejudice to seniority rights will occur. Actually in a number of cases men of the Texas-Pacific are to lose their jobs or are to be forced upon the extra board or are to suffer diminution in pay and loss of seniority rights and privileges to Missouri employees who have been subsequently employed upon the same job.

When the new contract was presented to the railways by the said Brotherhood the Texas employees who are applicants here instituted an action on June 5, 1944, in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, entitled *A. C. Bujol, et al., v. Missouri-Pacific Railroad Company, et al.*, No. 21,579 on the docket of that court for the purpose of having that court declare the manifest invalidity of the new agreement and to enjoin its execution. Serious charges of gross discrimination by the Brotherhood as against this minority

group were presented. R. 24, et seq. These included the charge that the new agreement was no more than an arbitrary political deal and collusive arrangement worked out between the officers, agents and representatives of the said Brotherhood and its Rapides Lodge which was composed principally of Missouri-Pacific employees; that a valid decision upon the issue of the proposed change arrived at and decreed by the three executives of the three brotherhoods in accordance with their respective conventions and constitutions had been ignored and that on the contrary the proposed change was predicated upon an invalid decision by the Board of Appeals of the Brotherhood of Railroad Trainmen alone dated November 16, 1943, which had been manipulated and controlled by the President of the Brotherhood in gross violation of the Brotherhood's Constitution and of its policy and convention arrangements with the other two brotherhoods; that the said Board of Appeals was without jurisdiction of the controversy, and its decision was null and void, and that further appeal which was attempted by the said minority group to the Board of Directors of the said Brotherhood and to its convention was unlawfully denied in violation of the Constitution and By-Laws of the said Brotherhood; and that in any event the proposed change in the agreement of June 2, 1927, would arbitrarily divest the said Texas employees of their contract rights, and would prejudice them in the serious respects noted above not only in violation of the said Brotherhood's Constitution and of its by-laws and conventional agreements but also in violation of the Fifth Amendment to the Constitution of the United States.

The unlawful discrimination so-charged was clearly of the same character as that treated with by this Court in

the decisions in *Steele v. Louisville & Nashville Railway Company*, 323 U. S. 192, 65 S. Ct. 226, 89th L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89th L. Ed. 187; and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89th L. Ed. 216.

In the state court the suit was dismissed for alleged lack of adequate citation of the nonresident Brotherhood and injunctive relief was denied. R. 47; R. 45. An appeal was prosecuted and is still pending in the Supreme Court of Louisiana, devolutive in character, but no issue of temporary or preliminary injunction is presented. The appeal there was sustained by the Supreme Court of Louisiana on a motion to dismiss filed by all of the respondents, A. C. Bujol, et al., v. Missouri Pacific Railroad Co., et al., No. 37,650, 20 So. (2) 608. As there was no suspensive relief in that case present counsel for the individual applicants addressed a letter to the said railways, R. 49, et seq., on June 26, 1944, stating in part, as follows, to-wit:

> "The purpose of this letter is to advise that petitioners intend, individually and collectively, to invoke all legal remedies available to them to enforce specific performance and legal adherence to the said contract, and in the alternative to sue in damages if the said contract is changed under said illegal decree." R. 51.

After a final judgment was entered in the lower court in that case counsel for the present individual applicants addressed a further letter to the said railways dated July 6, 1944, R. 54, et seq., stating that the said

individual applicants would prosecute the appeal to the Supreme Court of Louisiana and declaring the purpose of the parties to be:

> "to take any and all action available in this suit to enforce specific performance and legal adherence to the said contract (of June 2, 1927), and in the alternative to sue in damages if the said contract is changed under the said illegal decree of the Brotherhood of Railroad Trainmen."

Despite the pendency of the said appeal and the situation presented by these facts the said Brotherhood persisted in its contention that the said railways were required by the Railway Labor Act to amend and interpret the contract of June 2, 1927, so as to allow the proposed changes or suffer a heavy penalty for their willful failure to do so. R. 183. Faced with this dilemma, the said railways brought this action for declaratory judgment, praying by amended complaint, R. 123, et seq., that the Court declare:

> "(1) That plaintiffs are not required by law either to amend or to interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen;
>
> "(2) That plaintiffs are not required by law to confer, negotiate, or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning desire so to amend or interpret said contract of June 2, 1927, while the validity of said Brotherhood's actions and/or the authority of its officers, agents, or representatives so to amend or interpret said contract are being

challenged on the grounds and in the manner set forth in the foregoing bill of complaint;

"(3) That neither the Brotherhood of Railroad Trainmen or any person represented by it has or shall have any claim, demand, right, or cause of action whatsoever against plaintiffs, or either of them, for their refusal, jointly or severally, to amend or interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen, or for their refusal, jointly or severally, to confer, negotiate or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of said Brotherhood's actions and/or the authority of its officers, agents and representatives so to amend or interpret said contract are being challenged on the grounds and in the manner set forth herein.

"(4) In the alternative and in the event the Court should hold that plaintiffs are required by law to amend and/or interpret said contract of June 2, 1927, as desired by the Brotherhool of Railroad Trainmen, or should the Court hold that plaintiffs are required by law to confer, negotiate or bargain with officers, agents and representatives of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of the Brotherhood's actions and/or the authority of its officers, agents, and representatives so to amend or interpret said

contract are being challenged on the grounds and in the manner hereinabove set forth, then, and in either of those events, plaintiffs pray the Court to declare that plaintiffs, by so amending and/or interpreting said contract, or by so conferring, negotiating, or bargaining with reference to said amendment or interpretation, are not and shall not become liable in any manner to the individual defendants herein, or to any of them, or to any other person, for any injury or damage which they or any of them may sustain by reason of said amendment, interpretation, conference, negotiation or bargaining."

Certain motions to dismiss were filed by the said Brotherhood based upon the contention that no justiciable issue was presented, R. 53, and that thus the court was without jurisdiction; and by present individual applicants restricted to the alternative relief sought and based upon the contention that in any event the said contract of June 2, 1927, could not be changed where the other two brotherhoods had not been made parties to any of the proceedings. R. 54. All of said motions were overruled by the district court, R. 62, et seq.; R. 101, et seq., and thereafter and following a trial on the merits in which full proof was made by present individual applicants of the charges against the Brotherhood stated above the district judge granted the railways the declaratory relief sought under Item 1 of the foregoing prayer, namely declaring that said railways were not required by law either to amend or to interpret said contract of June 2, 1927, as was desired by the said Brotherhood. R. 329, et seq. An appeal was prosecuted by the said Brotherhood alone to the Fifth Cir-

cuit based upon six specifications of errors which will be discussed below. R. 341, et seq. After hearing there, that court decreed the failure of the complaint to state a justiciable controversy and accordingly sustained the Brotherhood's motion to dismiss for lack of jurisdiction. R. 349, et seq. Motions for rehearings were denied on March 19, 1927, R. 372.

2.

JURISDICTIONAL GROUNDS.

The present applicants and the railways are seeking relief here on the same jurisdictional grounds which were relied upon by the railways as a basis for declaratory relief in the first instance. Judicial Code 24 (8); U. S. C. A., Title 28, paragraph 41, subdivision 8, predicated directly upon paragraph II of the railways' complaint that "this controversy arises under the laws of the United States, namely, the Railway Labor Act of 1934, as amended (45 U. S. C. A., Sections 151 to 164).

This court in the cases of *Steele v. Louisville & Nashville Railway Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187; and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216, granted certiorari to the circuit because of the importance of the question presented in the administration of the Railway Labor Act in its relationship to interstate commerce. The specific question involved in those cases was whether the said Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees

the duty to represent all the employees in the craft without discrimination and if so whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. In the first two of said cases, the discrimination involved was racism. In the last, however, that of the *Wallace Corporation, supra*, racism was not the issue, and there following out the doctrine of both the *Steele* and *Tunstall* cases this Court found in reference to the issue presented, as follows, to-wit:

> "The duties of a bargaining agent selected under the terms of the act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation."

In all three of these cases the court found that a justiciable controversy was presented and that the federal courts do have jurisdiction, as the right of a minority to be protected against unlawful discrimination on the part of its own bargaining agency is without any adequate administrative relief under the act.

Here the Fifth Circuit applied what it termed the general rule enunciated by this court in the cases of *Brotherhood of Locomotive Engineers v. M. K. & T. R. Co.*, 320 U. S. 323; *Switchmen's Union v. National Mediation*, 320 U. S. 297; *Board of Railway Trainmen v. Toledo*, 321 U. S. 413; and *Bradley Lumber Co., v. N. L. R. B.*, 84 Fed.

(2) 97 and held in practical effect that the doctrine of discrimination recognized by this Court in *Steele, Tunstall* and *Wallace, supra*, was restricted to racism, and was not applicable or in any event could not be availed of until after the new agreement is made effective when if there is any just cause injunctive relief will be allowed. The respondent court thus in practical effect while denying its own jurisdiction nevertheless entered a declaratory judgment in which the railways are granted immunity to any liability of any kind either to the Brotherhood or to the Texas employees up to the point where the new agreement is to be made effective but beyond which the whole wrangle is to be renewed and the prospect of injunctive relief in favor of present applicants is to be dealt with. The substance of that decision is summed up in an excerpt from the said opinion quoted in the margin.[1]

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(1) "A consideration of the pleadings and the evidence in the light of the controlling authorities makes it perfectly clear that no justiciable controversy between the railroads and the appealing defendants is alleged or proven. Plaintiffs do not deny, indeed they admit that the Brotherhood is the accredited representative of the employees. They do not allege any fact which shows that they are justiciably concerned in the internal dispute between the members and the Brotherhood. The statute compels the carrier plaintiffs to negotiate collective agreements with accredited representatives. The Brotherhood is the accredited representative. There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable. If, the negotiation completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did, obtain relief from it. For, as was said in Steele's case:

> 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making.'

If, on the other hand, they have no such ground of complaint, the agreement will be binding on them. In either event, plaintiffs-carriers will be protected. In neither event will they have anything to fear."

3.

QUESTIONS PRESENTED.

First, where the railways had signed and fulfilled the obligations of a contract consummated more than fifteen years before involving the allocation and assignment of crews from two separate groups of employees under a consolidated plan in which three brotherhoods are involved, and then are presented with a contract proposing radical changes in the said agreement as to a minority group of employees in one of these brotherhoods alone, and where said railways are threatened with penalites if this new agreement is not made effective by the said Brotherhood, and are threatened by damage suits if it is made effective by the said minority group, and where no labor dispute is involved and there is no administrative remedy whatever under the Railway Labor Act, is a justiciable issue presented that entitles the said railways to declaratory relief of the nature here sought?

Second, in such a declaratory proceeding in which the minority group of the union is joined, and where it is shown that the proposed new agreement involves the grossest kind of discrimination against said group carried out by the bargaining agency in violation of its own constitution and conventions and of the Fifth Amendment to the Constitution of the United States, is the doctrine of the *Steele*, *Tunstall* and *Wallace Corporation* cases to be applied as soon as this invalidity is established and before the new agreement is made effective, or must the minority group suffer the execution and imposition of the new agreement and thereafter seek such injunctive relief and damages as may be available?

Third, is it permissible in any event and assuming that action must be delayed until the new agreement is signed, for the court in denying its own jurisdiction at the same time to declare that the railways will not be subjected to any claim in damages by the minority group suffering prejudice even though the new agreement may be shown to be unlawful?

4.

POINTS RELIED UPON.

The Fifth Circuit was in error of law in respect to the following points:

First, in failing to apply the doctrine of the *Steele, Tunstall and Wallace Corporation* cases, which are definite authority for the principle that under the Railway Labor Act minorities are to be protected against any kind of discrimination on the part of the legal bargaining agency in seeking to amend an existing contract arbitrarily and capriciously and so as to deny to the minority the right to earn a living where the proposed changes are not based on differences relevant to the authorized purposes of the contract.

Second, in ruling in effect that a justiciable issue arises in controversies of the present nature making available judicial remedies only where the discrimination involved is racism.

Third, in refusing in this case because racism was not involved to examine the complaint of the minority on the merits, where even a casual consideration readily reveals that the bargaining agency here is seeking to bring about the proposed discriminatory changes by action which not only represents arbitrary manipulation

of the processes within the Brotherhood in violation of its constitution and by-laws but also in violation of the Fifth Amendment to the Federal Constitution.

Fourth, in virtually closing its eyes to illegal action on the part of the bargaining agency which upon its face is equivalent to fraud, by suggesting that while the minority group in this case cannot prevent the proposed changes in the contract it will be allowed the remedy by injunction after the changes have been consummated if they prove to be invalid.

Fifth, in refusing to grant judicial remedies to proposed action which is shown to be under the facts of the case grossly illegal from its inception, upon the theory that even though this illegality is conceded no effective remedy is to be granted until after the new agreement has been made effective.

Sixth, in refusing to take jurisdiction of the case and in declaring that no justiciable issue is presented and at the same time in practical effect granting a declaratory judgment commanding the railways to negotiate with the bargaining agency of the Brotherhood upon the assurance that no liability can result from this action insofar as the railways are concerned, even though it may be shown to be illegal, and even though after the revision is consummated the aggrieved minority will be entitled to the legal remedies of injunction and damages.

Seventh, in holding that no justiciable issue is here presented where the nature of the complaint is in no sense a labor dispute as such dispute has been interpreted under the Railway Labor Act, and where no administrative remedy of any kind is provided under said act.

5.

Applicants show that the rules of this Court have been fully complied with.

WHEREFORE, applicants pray that an adequate alternative writ of certiorari be granted and that the Circuit Court of Appeals for the Fifth Circuit be required to send up the entire record in this case as is required under the rules of this Court, and that in due time and after further proceedings that said writ be made peremptory and that the judgment and decree of the said respondent court be avoided and reversed and that the judgment of the district court be reinstated and made final, and further for general and equitable relief in the premises.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF JURISDICTIONAL GROUNDS.

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the accompanying Petition at page 10.

STATEMENT OF CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed transcript will be found in the accompanying Petition at page 2, prepared and presented as is required by Rule 12.

SPECIFICATION OF ASSIGNED ERRORS.

A specification of the questions involved and of the errors attributed to the Circuit which are intended to be urged before this Court will be found in the accompanying Petition at pages 13 and 14, all as is required by paragraph 2 of Rule 38.

ARGUMENT.

In its decision rendered herein the Circuit Court has erroneously applied what it designates as the general rule embodied in *Brotherhood of Locomotive Engineers v. M. K. & T. R. Company*, 320 U. S. 323; *Switchmen's Union v. National Mediation*, 320 U. S. 297; *Board of Railway Trainmen v. Toledo*, 321 U. S. 413 and *Bradley Lumber Co. v. N. L. R. B.*, 84 Fed. (2) 97, and has erroneously failed to

apply the doctrine of *Steele v. Louisville & Nashville Railway Company*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216.

The first group of cases deal strictly with labor disputes where an administrative remedy was afforded by the Railway Labor Act which was not invoked by the complainant before he sought a judicial remedy. The second group of cases deal with the fundamental rights of a minority group in a labor union to invoke judicial remedies to prevent unlawful discriminations by the bargaining agency where there is no administrative remedy under the Railway Labor Act.

Here the arbitrary and gross discrimination on the part of the Brotherhood was shown beyond question, as is shown by the detailed analysis of the merits found in the final opinion of the district court, R. 329, et seq.; and as is fully demonstrated by documents contained in the transcript of this case which need not be reviewed in detail now.

On the merits the district court was called upon to choose between a joint decree of the three brotherhoods under which the rights of the present applicants to maintain in full force and effect the contract of June 2, 1927, was maintained, and a so-called decision by the Board of Appeals of the Brotherhood of Railway Trainmen alone in which the rights of present applicants were arbitrarily denied. The trial court experienced no difficulty in em-

phatically accepting the joint decree and in concluding that arbitrary discrimination was involved in bringing about the decree rendered by the said Board of Appeals; that the Constitution and conventions of the Brotherhood itself had been grossly violated. The facts are fully reviewed in the district court's opinion. R. 329, et seq. Limited excerpts from this opinion will be found in the margin.[1]

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(1) "The general rule is that our Courts should not interfere with such a controversy as here, if it involves nothing more than a construction of the Constitution and laws of the Brotherhood, and the determination of the jurisdiction of the Board of Directors, the Board of Appeals, and the Grand Lodge. Louisville and Nashville Railroad Company, et al. v. Miller, et al., 38 N. E. (2d) 239, 142 A. L. R. 1050.

Further, it follows however that, quoting from 142 A. L. R. 1067, Limitations on general rule:

'As the converse of the general rule that courts will not interfere with decisions made in good faith by appropriate union tribunals acting within the scope of their jurisdiction and power in settling controversies within the union over seniority rights arising out of the union's collective bargaining contract and its constitution, rules and bylaws, it would seem to follow that Courts will protect a union member's seniority rights, so arising, against action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts. So, a union member is entitled to judicial relief from the union's attempt to deprive him without authority of a personal or individual seniority privilege secured by contract with the employer. (Piercy v. Louisville & N. R. Co. (1923) 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322). Similarly, the seniority rights secured to members of a brotherhood by its rules and its contract with a railroad will be respected and protected by the Courts against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution. (Gleason v. Thomas, 117 W. Va. 550, 186 S. E. 304). And it has been said that seniority rights, when recognized and guaranteed by contracts between the employer and a union, inure to the benefit of individual employees, so that the employee may invoke the equity jurisdiction of Courts if full resort to the union tribunals has proved unavailing because of unreasonable construction of union laws or want of good faith on the part of its officers. (Lockwood v. Chitwood, 185 Okla. 44, 89 P. (2) 951).'

. . . . . .

A fortiori, however, are they entitled to an answer, since we are going to hold in this opinion that the Board of Appeals was absolutely without jurisdiction, and its action, consequently, was null and void. The action of the three executives of the brotherhood maintaining the original contract of June 2, 1927, is final, though subject to appeal to the directors or to the convention of the Brotherhood of Railroad Trainmen—the latter provision for an appeal being not important since

The Circuit Court did not consider or pass upon the merits of the case. That Court declared outright that no justiciable controversy was presented, as the issue of racism was not involved. Excerpts from the opinion of the court sustaining the correctness of this statement are shown in the margin.[2]

There is nothing in the *Steele* and *Tunstall* cases and certainly nothing in the case of *Wallace Corporation*, all referred to above, to justify the conclusion that the remedies allowed in those cases are restricted to instances where the discrimination involved is racism. Recently where the issue was not racism, this Court plainly implied that the doctrine of discrimination was available even as to an individual employee where a question of fundamental seniority right was involved and apparently only denied the availability of the doctrine there because the issue had

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(1) Continued

it has not been taken. Additionally the limitations of time have run and the appeal is precluded.

. . . . . .

(a) The decision by the joint executives of the three brotherhoods is empowered by Section 86, Interpretation of Laws, which is found under the main division "Grand Lodge" of the Constitution, in part reading as follows:

'The provisions of this Constitution shall be interpreted and construed according to their most plain and obvious meaning, and should any doubt arise as to the proper construction of any section or rule thereof it shall be referred to the President of the Brotherhood, whose decision shall be final, unless reversed by the Board of Directors or by the Grand Lodge.' " Tr. 330, et seq.

(2) "We think it may not be doubted: that the complaint presented no justiciable controversy; that it was fundamental error not to grant the motion to dismiss; and that the judgment must be reversed and the cause remanded with directions to dismiss the suit. We, therefore, do not reach the second question, whether the judgment was right on the merits.

. . . . . .

. . . . . In sustaining the right of Steele and Tunstall to judicial relief, it (referring to this Court) took the greatest pains to point out that it sustained their rights because, with the Union acting adversely on racial grounds to the very per- (fol. 358) sons they were supposed to represent, the constitutional right of the plaintiffs not to be so discriminated against would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such duty or obligation." R. 355, et seq.

become "*res adjudicata*" upon the basis of action had in a prior suit.[3] On the contrary it is the unequivocal doctrine of these cases that the bargaining agency is the agent of all of the employees charged with the responsibility of representing their interests fairly and impartially. In the *Steele* case, *supra*, this Court made declarations quoted in the margin from *Trailmobile Co. v. Whirls*[3], *supra*,

[3] "We also agree that the question of unlawful discrimination is not properly before us for decision. That question, insofar as it arose from events prior to this litigation, was involved in the Ohio class suit without reference, it would seem, to § 8 or its possible effects. And because the petition for certiorari, as we have noted, assigned no error to the Court of Appeals' ruling on the issue of "res judicata" arising from the outcome of the class suit, we are not at liberty now to consider the effect of that litigation or the issues of discrimination embraced in it. Insofar as any question of unlawful discrimination may be thought to arise from the facts said to have taken place after the decision of the Court of Appeals, we are also not free at this time to consider or determine such an issue. As the brief of the Government in respondent's behalf pertinently states, 'These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party to the issue of unfair discrimination. Cf. Hormel v. Helvering, 312 U. S. 552, 556, 61 S. Ct. 719, 721, 85 L. Ed. 1037. In view of that fact, and of the Hess litigation, we believe that it would be inappropriate, at this state, to argue these issues.'" Trailmobile Co., et al. v. Whirls, 67 S. Ct. 987.

From the dissenting opinion, we quote the following:

"We have held under a similar Act that the courts may intervene to prevent a majority union from negotiating a contract in favor of itself against a colored minority. Speaking for all but two members of the Court, Chief Justice Stone, after recognizing that the representatives may make 'contracts which may have unfavorable effects on some of the members of the craft represented' in such matters as seniority, based on relevent differences of conditions, said: 'Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences.' Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192, 203, 65 S. Ct. 226, 232, 89 L. Ed. 123. That opinion also declared that 'It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.' 323 U. S. at page 202, 65 S. Ct. at page 232, 89 L. Ed. 173. And in Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187, we held that where an individual is without available administrative remedies, the courts must grant him protection." Trailmobile Co. v. Whirls, 67 S. Ct. 996.

showing that the Court had in mind any kind of discrimination of an obviously irrelevant and invidious nature. It was pointed out there that a change in an existing contract dealing with the rights of employees and effecting wages, hours and working conditions would not be sanctioned as legal and binding where such proposed change was not based on differences relevant to the authorized purposes of the contract. There this Court placed stress upon the fact that in such cases there is no adequate available administrative remedy under the Railway Labor Act. The Court said this:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction . . ."
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> . . . . . .
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> "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making."

Here the Circuit Court apparently recognizes that present applicants will be entitled to some kind of relief after the new agreement has been made operative. There

is nothing in any jurisprudence that sanctions this idea. In this connection the court below made these observations which we repeat for emphasis:

> . . . "The Brotherhood is the accredited representative. There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable. If, the negotiation completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did obtain relief from it. For, as was said in Steele's case:
>
> 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making'.
>
> If, on the other hand, they have no such ground of complaint, the agreement will be binding on them. In either (fol. 361) event, plaintiffs-carriers will be protected. In neither event will they have anything to fear." R. 359.

Thus the court denying its own jurisdiction, nevertheless, attempts to grant a declaratory judgment in effect commanding the railways to negotiate with the bargaining agency of the Brotherhood upon an extra legal assurance that no liability can result from this action insofar as the railways are concerned, and at the same time suggesting that if the revised contract is illegal the aggrieved minority is to abide its time until it is made effective and then is to invoke such judicial remedies as may be available. It is a strange doctrine to suggest that an illegal action can only be enjoined after it has been committed, and thus at a time when at least some damage of an irreparable nature may have resulted from it. There would seem to be no good reason why the Railway Labor Act should be interpreted so as to justify illegal action in its inception that can thereafter not only be enjoined but used as a predicate for a damage suit. In the *Steele* case this Court made the following statement:

> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."

It is true that both in the *Tunstall* and *Steele* cases the specific issue as to whether damages could be recovered from the railways was apparently not presented. In the *Tunstall* case, however, we find the following observation:

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by

> the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequence of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted."

If the Circuit Court was warranted in concluding that a justiciable issue was not involved, it certainly had no right to say what the liability of the railways may prove to be under the contract of June 2nd, if at some time following the effective date of the proposed change this aggrieved minority should assert a claim in damages which by the authority of this Court is thus left by the statute to judicial determination.

The Circuit Court's observations as to the railways ultimate liability and its further observations as to the present applicants' remedy by injunction is certainly not "*res adjudicata*" or determinative of either issue, and cannot be unless a justiciable issue had been presented. If a justiciable issue is presented then the Court should proceed now to decide whether the proposed change is valid and proper, or whether it is capricious and of such discriminating character as warrants the application of the doctrine of the *Steele, Tunstall* and *Wallace Corporation* cases, *supra.*

We are satisfied that under the customary practice of this Court if the writs sought herein are granted

and are ultimately made peremptory that the Court will desire to remand this case to the Circuit for further consideration upon the merits, and for this reason we do not deem it necessary or proper to enter into a full discussion of the factual questions presented upon this phase of the case. It would seem sufficient in any event to again refer this Court to the discussion of these facts contained in the written opinion of the district judge, R. 62, in which he designated the action of the bargaining agency here as inherently invalid; and to remind this Court that in the decision rendered by the Circuit Court the merits of the case were not considered.

CONCLUSION.

Applicants respectfully submit that the writs herein sought should be granted and in due time should be made peremptory, and accordingly that the judgment and decree of the Fifth Circuit should be avoided and reversed, and that the decision of the district court should be reinstated and made final, or in the alternative this case should be remanded to the Fifth Circuit to be there considered and decided upon the merits of the controversy.

Respectfully submitted,

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